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May 16, 1995

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Dear Mr. Caton:

On behalf of Capital Cities/ABC, Inc., transmitted herewith for filing with the Commission are an original and ten copies of its Comments in MM Docket Nos. 91-221 and 87-8.

If there are any questions in connection with the foregoing, please contact the undersigned.

Sincerely,

Roger Goodspeed

RG/ak
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

COMMENTS OF CAPITAL CITIES/ABC, INC.

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May 16, 1995

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SUMMARY

To respond fully to the Commission's Further Notice, Capital Cities/ABC (jointly with CBS, NBC and Westinghouse) commissioned an economic analysis of the broadcast television national ownership, local ownership and radio-television cross-ownership rules which is being submitted in this proceeding by our economic consultant, Economists, Inc. (the "Analysis"). In this pleading, we will present our proposals for changes in the rules in light of that economic analysis.

National Ownership Rule

The Analysis demonstrates that in today's video marketplace the rule does nothing to further the Commission's goals of protecting competition and diversity. To the contrary, continuation of the rule works at cross-purpose with those goals.

Elimination of the national ownership rule would not lead to any concentration of market power that would trigger concern under established antitrust merger guidelines. Since the rule was last relaxed in 1984, there has been a tremendous increase in the number of video outlets and a comparable explosion in the number of nationally distributed program services. These changes, coupled with the drastic reduction in network affiliate shares, have put to rest any concern that the rule may be necessary to protect competition.

To the contrary, the rule is anticompetitive in its impact because it prevents broadcasters from exploiting economies of scale. Economies of scale lead to greater financial resources for broadcasters which allows them to compete more effectively. This

is particularly important in the current and future video marketplace where competition from non-broadcast media is vigorous and growing. The rule prevents stations from being owned by entities most able to put them to efficient and valuable use and imposes an artificially small scale of operation on the broadcast industry.

Diversity considerations do not alter these conclusions. Common ownership across markets would do nothing to lessen outlet diversity in any market. Indeed, if anything, the evidence shows that group owners generally tend to promote diversity. The primary focus of the Commission's diversity concerns is local news and public affairs programming. Group-owned stations generally devote more time to such programs than non-group-owned stations.

Any lingering concerns that eliminating the rule could in extreme cases lead to combinations that would adversely impact competition or diversity can be more than adequately addressed through antitrust enforcement.

Television Duopoly Rule

The Commission should at minimum relax the rule by restricting only Grade A overlap. The Analysis demonstrates that television stations with Grade B but not Grade A overlaps do not generally compete for viewers, advertisers or programming. Diversity would not be diminished by using a Grade A overlap standard because stations with only Grade B overlaps are located up to 100 to 140 miles apart and service different communities. In order to meet the demand for local news, a common owner of two such stations, acting in its own self interest, would program different local news for each of the separate communities.

With respect to stations with Grade A overlap, there should not be a _per se_ rule prohibiting all such combinations. Because competitive conditions vary widely across markets, a _per se_ rule would foreclose overlaps even in situations where common ownership would be either competitively neutral or beneficial. Instead, the Commission should proceed on a case-by-case basis and should be prepared to permit such combinations where the adverse effects are slight and there is a demonstrated showing of efficiencies and public interest benefits to be gained.

Radio-Television Cross-Ownership Rule

The radio-television cross-ownership rule should be eliminated. The Commission has in place both a set of radio ownership rules that impose limits on radio concentration and duopoly rules for television. In light of the existence of separate rules for radio and television, no useful purpose is served by keeping in place an additional supervening rule that would apply to radio-television combinations.

The Analysis demonstrates that radio-television cross-ownership would not raise competitive concerns in any of the three markets defined by the Commission -- delivered video programming, advertising and video program acquisition.

Local Marketing Agreements

LMA's involving television stations should be treated in the same basic manner as LMA's of radio stations. An owner of one station in a market that controls programming and advertising on a second station in the same market should have the second station count against its ownership limits.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

To: The Commission

COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("Capital Cities/ABC") submits herewith its Comments in response to the Further Notice of Proposed Rule Making in the above-entitled proceeding ("Further Notice").[1] Capital Cities/ABC is a diversified media company that operates the ABC Television network and owns eight television broadcast stations,[2] twenty-one radio stations and a number of cable networks and daily newspapers. Its interests are directly affected by regulatory limits on the number of stations it can own.

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[1] MM Docket Nos. 91-221, 87-8, Further Notice of Proposed Rule Making, FCC 94-322 (released January 17, 1995).

[2] Subsidiaries of Capital Cities/ABC currently have applications pending before the Commission, filed October 21, 1994, for consent to a transfer to those entities of control of television stations WJRT, Flint, Michigan (File No. BTCCT-941021KG), and WTVG, Toledo, Ohio (File No. BTCCT-941021KF).

I. Introduction

The Commission in the Further Notice continues a process of reevaluation of its existing ownership rules which was set in motion by a 1991 report by the Commission's Office of Plans and Policy (OPP). The OPP report observed that the video programming marketplace had undergone tremendous changes over the previous 15 years which resulted in increased competition for broadcast television and affected its ability to contribute to a diverse and competitive video programming marketplace.[3]

In this Further Notice, the Commission proposes a structured analytical framework within which to perform an economic and diversity analysis of the ownership rules as applied to television stations in order to determine how the current regulatory scheme affects competition and consumer welfare. The Further Notice requests that commenters frame their discussion consistent with the proposed analytical framework.[4]

In response to the Further Notice, we (jointly with NBC, CBS and Westinghouse) commissioned an economic analysis of the broadcast television national ownership, local ownership and radio-television cross-ownership rules which is being submitted in this proceeding by our economic consultant, Economists, Inc. (the "Analysis"). In this pleading, we will present our proposals for changes in the rules in light of that economic analysis.

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[3] Further Notice, par. 6.

[4] Further Notice, pars. 1, 141.

The overall theme of the Analysis and this pleading is that the national television ownership limits,[5] the television duopoly rule,[6] and the one-to-a-market rule,[7] in their current form, do not serve their intended purpose of fostering competition and diversity and in fact lead to anticompetitive results. The Analysis shows that reliance on current antitrust enforcement standards for mergers, as set forth in the U.S. Department of Justice/FTC 1992 Horizontal Merger Guidelines (hereinafter, "US Merger Guidelines"), would adequately protect the public both from the creation of market power and from any reduction in diversity.[8] In the absence of market power or adverse diversity effects, there is no basis for governmentally imposed ownership limits. Since a competitive market, and the ownership patterns that emerge from that competition, can be presumed to be responsive to consumer interest, governmental interference in the market reduces consumer welfare by

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5 47 C.F.R. 73.3555(e) (allowing single ownership of up to 12 VHF and UHF stations provided they operate in DMAs containing cumulatively no more than 25% of television households). Ownership of UHF stations results in attribution of 50% of the television households in the relevant DMA. The limits for minority-controlled stations are 14 stations and 30% of television households.

6 47 C.F.R. 73.3555(b) (precluding common ownership of stations with overlapping Grade B contours).

7 47 C.F.R. 73.3555(c) (barring joint ownership of radio and television combinations in the same or neighboring markets based on signal contour).

8 <u>See</u> Analysis at 3-6 for a description of the antitrust law controls over mergers that threaten incipient trends toward concentration. The Commission can and should generally rely on the enforcement of these standards by government authorities and private litigation. In one area, television duopoly, we propose that the Commission apply these standards itself.

imposing an artificially small scale of operation on the broadcast industry.[9]

II. National Ownership Rule

A. Rationale For And Recent History Of The Rule.

The national multiple ownership rule was originally established in the 1940's and was designed to foster economic competition and diversity of viewpoints. The rule was based on "possibilities" and "assumptions" about potential group-ownership concerns, rather than actual abuse.[10] With respect to competition, the Commission relied on a "scarcity" argument as one basis for the rule, i.e., that the limited number of broadcast stations justified ownership restrictions to eliminate the possibility of monopolistic control.[11] Similarly, broad ownership diversity was assumed to promote diversity of viewpoints and program sources, but that assumption "was not based on hard evidence in the record."[12]

The Commission undertook a comprehensive review of the broadcast and cable marketplace when it amended the national multiple ownership rule in 1984 and 1985. It determined that

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[9] Analysis at iv, 1-2.

[10] "The Commission adopted the rule on the basis of prognostication, not empirical proof, and relied on assumptions which at the time were untestable." Report and Order, Gen. Docket No. 83-1009, 100 FCC 2d 17, 56 RR 2d 859, par. 20 (1984) ("Ownership Order"), on reconsideration, Memorandum Opinion and Order, 100 FCC 2d 74, 57 RR 2d 966 (1985) ("Ownership Reconsideration Order").

[11] Ownership Order, par. 7.

[12] Id., par. 20.

effects on competition and diversity are to be evaluated primarily in the context of the local market[13] and that, therefore, "national broadcast ownership limits ... ordinarily are not pertinent to assuring a diversity of views to the constituent elements of the American public."[14]

With respect to the possibility of competitive harm on a national level, the Commission concluded that the massive increase in the number of television broadcast stations and other media that compete with them for audience and advertising revenue "eliminated monopolistic control as a serious threat."[15] It rejected the contention that increased station ownership would lead to competitive harm in the national broadcast advertising marketplace.[16]

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[13] It has repeatedly reaffirmed that conclusion. Second Report and Order, MM Docket No. 87-7, 4 FCC Rcd 1723, 65 RR 2d 1589 (1989) ("One-To-A-Market Order"); modified on reconsideration, Memorandum Opinion and Order, MM Docket No. 87-7, 66 RR 2d 1115 (1989) ("One-To-A-Market Reconsideration"); Report and Order, MM Docket No. 91-140, 7 FCC Rcd 2755, 70 RR 2d 903 (1992) ("Radio Ownership Order"), par. 20, modified on reconsideration Memorandum Opinion and Order, MM Docket No. 91-140, 71 RR 2d 227 (1992) ("Radio Ownership Reconsideration").

[14] Ownership Order, par. 60 ("[T]he most important idea markets are local. For an individual member of the audience, the richness of ideas to which he is exposed turns on how many diverse views are available in his local market."). See also id., par. 32.

[15] Ownership Order, par. 7.

[16] Citing the Comments of the Department of Justice, the Commission concluded that elimination of the national rule would have no adverse effect on the network advertising market, since the networks already have access to virtually every local market via their affiliation agreements. Id., par. 71. See Further Notice, par. 86.

The Commission also rejected the theoretical notion that diversity might somehow be decreased on a national level through the imposition of a single owner's identical ideas in a large number of local markets. The Commission correctly recognized that the impact on diversity is most appropriately measured at the local level, and expanded group ownership does not reduce the choices available in any local market. Nor is there otherwise a loss of diversity.

First, the Commission found that "group owners do not impose monolithic viewpoints on local media outlets."[17] That remains the case today. Group-owned stations make autonomous decisions with respect to non-network programming and local news, based on the needs of their communities. Each of the Capital Cities/ABC stations broadcasts local public affairs programming unique to its community.

Second, the Commission cited the nationwide "abundance of idea sources" in the more than 10,000 broadcast stations and more than 12,000 newspapers and periodicals. Elimination of the rule would, "at worst," result in an "inconsequential decrease in idea sources nationwide."[18]

Finally, the Commission noted that efficiencies flowing from group ownership can affirmatively encourage diversity of viewpoint by making more resources available to improve program quality.[19]

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[17] Id., par. 61.

[18] Ownership Order, par. 61.

[19] Id., par. 62.

These compelling findings initially led the Commission to eliminate the national ownership cap altogether subject to a six year sunset provision.[20] On reconsideration, the Commission elected to retain the rule, albeit in modified form, in order to "proceed cautiously in relaxing rules that affect such a vital aspect of the broadcasting industry."[21] But the caution that led the Commission to retain significant national limits in 1985 is no longer appropriate. As the Commission itself recognized in the 1992 Notice of Proposed Rule Making in this proceeding, "the primary concern underlying the national ownership rule -- preventing economic concentration and consequent harm to diversity -- may have abated with the proliferation of television stations and alternative sources of video programming described [earlier in the Notice]."[22] That view is even more valid today, as we now show.

B. The Television Market Has Undergone Significant Changes Since The National Multiple Ownership Rule Was Amended in 1984.

The number of video outlets has increased substantially since the Commission relaxed the national multiple ownership rule ten years ago. In the 1984 Ownership Order, the Commission indicated that there were 1169 television broadcast stations, 6400 cable systems (passing 64% percent of all television households) and only

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[20] Id., par. 5.

[21] Ownership Reconsideration Order, par. 49.

[22] Notice of Proposed Rule Making, MM Docket No. 91-221, 7 FCC Rcd 4111 (1992), par. 11 ("Notice").

a small percentage of households had home video cassette recorders.[23] In contrast, today there are over 1500 television broadcast stations, including roughly 320 independent stations;[24] 11,351 cable systems[25] (passing approximately 96% percent of all television households);[26] and 89% of television households now have VCRs.[27] In addition, subscriptions to video programming via MMDS, SMATV or backyard satellite dishes, almost non-existent in 1985, now amount to nearly 4 million households,[28] and DBS systems sold over 300,000 subscriptions by the end of 1994.[29] The tremendous increase in video outlets has led to a comparable explosion in the number of nationally distributed program services, including the Fox, UPN and Warner Bros. networks and cable program services. These changes, coupled with a reduction in network affiliate audience from shares of over 90% in 1977 to barely a 60% share today,[30] further support the Commission's conclusion that its

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[23] Ownership Order, par. 35.

[24] Television & Cable Factbook, Services, at I-75 (1995).

[25] Television & Cable Factbook, TV Stations, at iv (1995).

[26] Kagan Media Index, Jan. 11, 1995, at 7, 14. See Analysis, Appendix Table A-1; Further Notice, par. 26. From 1984 to 1995, the cable subscription rate of television households increased from 43.7% to 62.5%. Further Notice, par. 26 n. 42.

[27] Kagan Media Index, Oct. 31, 1994, at 2.

[28] Kagan Media Index, Jan. 11, 1995, at 7, 14. See Analysis, Appendix Table A-5.

[29] Kent Gibbons, DBS: We're Walking the Walk, Multichannel News, Jan. 16, 1995, at 3. See Further Notice, par. 27.

[30] One-To-A-Market Order, par. 29; Analysis, Appendix Table A-3.

diversity and competition goals do not need the protection of the current national multiple ownership rule.

C. Competition and Diversity Would Not Be Diminished By Eliminating the National Ownership Rule.

1. Competition in the Delivered Video, Advertising and Video Programming Markets.

The Commission has enumerated and defined three markets -- delivered video programming, advertising and video program production -- as the markets relevant to the analysis of the effects of the ownership rules on competition.[31] The Analysis concludes that the Commission's market definitions are in many instances unduly narrow, but that even under the Commission's definitions, relaxation of the national ownership rule would not increase the potential for anticompetitive behavior.

With respect to delivered video programming, the Commission includes in the product market only commercial and public broadcasters, cable system operators and other systems that deliver video to the home.[32] The Analysis demonstrates that that definition is likely too narrow, and should include viewing of videocassettes as well as non-video forms of news and entertainment.[33] The Commission has repeated its 1984 view that the appropriate geographic market, the "area of effective competition," is the

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[31] Further Notice, par. 22.

[32] Further Notice, par. 29.

[33] Analysis at 10-13, Appendix A.

local area.[34] Even accepting the Commission's narrower product market, group ownership of stations has no adverse effect on the number of stations, on competition for viewers, or on the quality of delivered programming in that geographic market.[35] Further, even if one posits for the sake of argument that the geographic market is not local, and that television stations throughout the country compete with each other nationally for viewers, the resulting "HHI" calculation falls well below the level that would warrant investigation under the US Merger Guidelines, indicating an unconcentrated market.[36]

With respect to the national advertising market, the Commission includes only video media, and only advertising supplied by broadcast networks, program syndicators and cable networks. The Commission's market definition excludes all non-video advertising such as national radio and national print advertising,[37] and within the video industry, all DBS advertising and all national spot advertising carried by broadcast television stations and cable systems (except "perhaps" MSOs).[38] The Commission's proposed national video advertising market is too narrow. There is abundant evidence that a correctly defined national advertising market would

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[34] Further Notice, par. 31.

[35] Id., pars. 83-85. See Analysis at 80-83.

[36] Analysis at 60-62, Tables 8, 9.

[37] Further Notice, par. 37.

[38] Id. The Commission proposes to include spot advertising in local advertising markets rather than to include national spot in its national video advertising market.

include national spot advertising and a number of types of non-video advertising such as radio and print.[39]

But even under the Commission's narrow market definition, concentration in the national advertising market is moderate under the US Merger Guidelines.[40] The likelihood of anticompetitive behavior is further reduced by the fact that it would be very difficult for the sellers of broadcast advertising time to reach, monitor or enforce any collusive agreement.[41] While it might be posited that increasing national ownership limits could permit the use of power in one local market to adversely affect another such market, the Commission in the Further Notice is properly highly skeptical that any broadcast station possesses such power or that such deleterious effects can be expected to occur.[42] The Analysis presents additional support for the Commission's comments.[43]

With respect to video program production, the Commission defines that market to include all video programming. The competitive concern in that market with respect to the national

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[39] Analysis at 18-23, Appendix D. Appendix D presents evidence on substitution by national advertisers among broadcast television spot, broadcast network, syndication, cable network, cable spot, radio network, radio spot, newspaper, magazine, yellow pages, outdoor and direct mail advertising. Similarly, the appendix presents evidence on substitution by local advertisers among broadcast television spot, cable spot, radio spot, newspaper, yellow pages, outdoor and direct mail advertising.

[40] Analysis at 28, Table 4.

[41] Analysis at 34-36.

[42] Further Notice at 87-88.

[43] Analysis at 32-37.

ownership rule is one of either monopsony or oligopsony power.[44] The Commission identifies the potential buyers in the market to include broadcast television networks and syndicators, cable networks, cable operators, DBS and other satellite services, low power television stations and telephone companies.[45] The Analysis demonstrates that concentration among firms buying national rights to video programming is very low; the "HHI" is under 800.[46] Without the national ownership limits, antitrust enforcement under the US Merger Guidelines would prevent any increase in concentration before there was a threat to competition. As the Commission correctly has recognized, one cannot "foresee that the relaxing of the national ownership limits for broadcast television stations will cause any significant economic harm to those markets."[47]

2. Diversity Would Not Be Diminished By Elimination of the National Ownership Rule.

Common ownership across markets would do nothing to lessen

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[44] Further Notice, pars. 46-47; Analysis at 38-39.

[45] Analysis at 82. See Further Notice, pars. 48-49. The Commission makes no mention of home video, which should properly be included in the market because videocassette producers buy programs for national distribution.

[46] Analysis at 42-43, Appendix G, Table G-7. The Commission's concentration analysis assumed commercial broadcasters face no other competition for the purchase of video programs and calculated an "HHI" of 121. Further Notice, par. 89.

[47] Further Notice, par. 90. The Commission correctly rejects concerns about the export of power from one market to another. See Analysis at 82-83.

outlet diversity in any local market.[48] Indeed there is evidence that, if anything, group ownership tends to promote diversity.

The Commission has previously determined that significant diversity effects are to be evaluated on a local market basis. Thus, the primary focus of the Commission's diversity concerns is local news and public affairs programming.[49] There is no evidence that common ownership interferes with the delivery of such programming. To the contrary, there is evidence that group-owned stations devote more time to such programs than non-group-owned stations.[50] And this makes sense.

To start with, self-interest provides all the incentive necessary to encourage group owners' investment in local news because commercial success for local broadcast stations is tied to news leadership. To meet the demand for local news, and thus insure commercial success, group owners can be expected -- and do -- hire local managers who are responsive to local community needs. And, perhaps most importantly, group owners that have lower costs as the result of economies of scale and scope have -- and tend to devote -- more resources to pursuing these objectives.[51] For these very reasons, the Commission has recognized that "group television station owners generally allow local managers to make editorial and reporting decisions autonomously and that group-owned stations are

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[48] Analysis at 83.

[49] Notice at 72.

[50] Analysis at 79-80.

[51] Analysis at 83.

more likely than others to editorialize."[52]

Any lingering concerns that increased common ownership could somehow adversely impact diversity would be more than adequately addressed through antitrust enforcement. There is no need for the imposition of a separate Commission rule. The potential impact on diversity must necessarily be analyzed on the basis of a market definition that is at least as broad as market definitions typically applied for antitrust purposes. Indeed, the idea market in any local area would encompass all media available to consumers, including those located outside the area but which serve the area. Thus, television, cable, DBS, MMDS, radio, videocassettes, newspapers, yellow pages, direct mail and outdoor are all part of the local idea market for diversity purposes to the extent there is a local outlet or local distribution. The relevant market for antitrust analysis would be no broader than the idea market and might be narrower. For example, the Commission has defined video-program production to include only video programming[53] even though radio and newspapers and other excluded media contribute to diversity. Thus, under such a market definition, antitrust enforcement under the US Merger Guidelines would ensure that undue economic concentration would be foreclosed well before there was any material effect on diversity.[54]

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[52] Further Notice, pars. 62, 96. See Ownership Order, pars. 51, 61-63, 100; Analysis at 78-80.

[53] Analysis at 39.

[54] See Analysis at 58-59, 83.

D. The Current National Ownership Rule Leads to Anticompetitive Results by Precluding Efficiencies of Group Ownership.

The current ownership rule disables broadcasters from exploiting economies of scale. The Commission has consistently recognized in several contexts the public interest benefits of efficiencies available through multiple ownership of broadcast stations. Those economies of scale lead to greater financial resources for broadcasters, allow them to compete more effectively, and thus ultimately provide better service to the public.[55] Allowing broadcasters to exploit such efficiencies is particularly important in the current and future video marketplace, where competition from non-broadcast media is vigorous and growing as the result of both expansion of channel capacity and the increasing popularity of alternative program offerings. Among the specific efficiency benefits historically recognized by the Commission are group advertising sales and program purchases,[56] consolidation of administrative functions, joint capital expenditures for equipment and facilities,[57] and sharing the cost of professional services by lawyers, accountants, insurers and engineers.[58]

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[55] See Radio Ownership Order, pars. 38-39; One-To-A-Market Order, pars. 39-45, 54-61, 64-67; Notice, par. 11.

[56] Ownership Order, par. 82.

[57] First Report and Order, MM Docket No. 87-7, 4 FCC Rcd 1723, 65 RR 2d 1676, pars. 35-36 (1989) ("Radio Contour Order"). See Analysis at 67.

[58] One-To-A-Market Order, pars. 39-45. See Analysis at 65.

In addition, group ownership affords additional benefits over individual ownership by improving stations' ability to attract and retain high-quality employees, creating an internal exchange market for equipment, making superior management skills available to local markets, reducing costs associated with negotiating affiliations, and encouraging development of original programming and the pursuit of unused channel assignments that would add to television service.[59]

To the extent that the rule constrains group owners from making additional investments in stations, the effect is to reduce the efficiencies of resource allocation by preventing stations from being owned by entities that are in a position to put them to their most valuable uses. The rule currently constrains a number of group owners from expanding their groups.[60] The constraint operates both to limit the size of groups and to force group owners to choose between a regional concentration strategy and a geographic diversification strategy when it may be more efficient to pursue both.[61] The inefficiency caused by the rule is shown empirically by the increase in television station prices that accompanied the 1984 relaxation of the rules. Group owners were willing to pay more for stations because they had the ability to operate them in more productive ways.[62]

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[59] Analysis at 67-70.

[60] Analysis at 75-76.

[61] Analysis at 70.

[62] Analysis at 77.

E. Conclusion: Economic Analysis Shows No Need for Special Rules to Protect Competition and Diversity in Television Broadcasting Beyond The Antitrust Laws.

The Analysis submitted with this pleading presents persuasive evidence that not only do the national ownership limits fail to serve the Commission's goals of competition and diversity, but they work damage to the public interest by preventing stations from being owned by entities most able to put them to efficient and valuable use. The antitrust laws provide adequate remedies for acquisitions that present incipient trends toward undue concentration, and there are no special competitive considerations that would require more stringent combination standards for the television broadcast industry. Diversity considerations do not alter those conclusions because the diversity is measured by markets at least as broad as the markets used for competitive analysis.

The Commission's national ownership rule now prohibits all acquisitions of a certain type, without regard to their effect on competition or the public interest. The antitrust laws preclude only those mergers that are likely to harm consumers. The Analysis shows dramatically that no such harm would flow from the elimination of the national ownership rule. Even were group owners each permitted to own one station in each of the 211 DMA's, to the fullest extent of available stations, the "HHI" would be no more than 867, a level of concentration that would not raise any antitrust enforcement concern.[63] Ownership limits that are stricter

[63] Analysis at 60-62, Table 8.

than would be imposed by generally accepted antitrust standards harm consumer welfare by imposing an artificially small scale of operation on the broadcast industry. This would handicap broadcasters as they compete in the ever-expanding video marketplace particularly in the face of shrinking broadcast audience shares. Therefore, we advocate elimination of the national ownership rule.

We take note of the fact that most of the debate surrounding the national ownership rule has focused on the 25% coverage of households aspect of the rule with very little attention focused on the numerical cap of 12 stations. In our judgment, whatever the Commission ultimately concludes concerning the justification for any percentage of households limitation, it should reject the numerical cap prong as unnecessary, duplicative, and likely to lead to perverse results. If national market power or editorial influence is what is sought to be measured by a national ownership rule, then the number of stations owned, applied as a separate standard, has no relevance. For example, it cannot plausibly be argued that the Providence Journal, with coverage of 5.8% of television households, or Clear Channel, with 5.5% coverage, has anything approaching "too much" national power or influence.[64] Yet, because of the separate numerical cap prong of the current national

[64] Analysis at 76, Table 10. Notably, when the Commission added the audience reach limit to the numerical cap in 1985, it did so because the cap "may not give appropriate consideration to wide discrepancies in population coverage because a station in the largest market is deemed equivalent to a station in the smallest market." Ownership Reconsideration Order, pars. 36-37.

ownership rule, the Providence Journal is permitted to buy only one more station and Clear Channel only two more. The perverse outcome that the numerical cap could lead to, and which it may already have produced, is to disadvantage stations in smaller markets. Faced with both a percentage cap and a numerical cap, group owners with the requisite resources have every incentive to maximize their opportunities by buying in larger markets and turning away smaller market offers. Moreover, imposing a numerical cap on a national basis does nothing to foster diversity on a local level which is the focus of the Commission's diversity concerns. The impact on diversity on a local level is the same whether the owner of a station owns one station nationwide or forty.

III. Television Duopoly Rule

A. The Commission Should, At A Minimum, Relax The Rule By Restricting Only Grade A Overlap.

In 1964, when the Commission enacted the television duopoly rule,[65] it proposed and then rejected a local-market ownership rule forbidding only Grade A contour overlaps.[66] The Commission concluded that a "more restrictive overlap rule is required for television" than for the radio services because "television has a considerably greater impact upon the public" and "there are many

[65] 47 C.F.R. 73.3555(b).

[66] Report and Order, Docket No. 14711, 2 RR 2d 1588, pars. 1, 17, 19 (1964) ("Duopoly Order").